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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

JEFF HATCH-MILLER - CHAIRMAN  
WILLIAM A. MUNDELL  
MARC SPITZER  
MIKE GLEASON  
KRISTIN K. MAYES

2006 OCT 27 P 4: 16

AZ CORP COMMISSION  
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

OCT 27 2006

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In the matter of:

Docket No. S-20437A-05-0925

Reserve Oil & Gas, Inc., a Nevada corporation  
3507 North Central Avenue, Suite 503  
Phoenix, Arizona 85012

**MOTION TO PRECLUDE AND  
MEMORANDUM OF LAW IN  
SUPPORT OF EXCLUSION OF  
HEARSAY TESTIMONY**

Allen and Jane Doe Stout, Sr., husband and wife  
1309 West Portland Street  
Phoenix, Arizona 85007-2102

Allen and Jane Doe Stout, Jr., husband and wife  
1309 West Portland Street  
Phoenix, AZ 85007-2102

Respondents.

NOW COMES the Respondent, Allen Stout, Sr. and files this, his Motion to Preclude and Memorandum of Law in Support of Exclusion of Hearsay Testimony and, in support thereof, would respectfully show the Hearing Officer as follows:

I.

**PRELIMINARY STATEMENT**

Section 41-1062(A)(1) of the Arizona Administrative Procedure Act ("APA") provides that every person who is a party to an administrative proceeding in a contested case "shall have the right of cross-examination." *See also* Arizona Administrative Code, § R2-19-115(A). The APA also provides that, although a hearing may be conducted without adherence to the rules of evidence, "the evidence supporting such decision or order [must be] substantial, reliable and probative." APA § 41-1062(A)(1). These provisions mandate the exclusion of hearsay testimony, specifically testimony relating to discussions between Division Investigators and Peter Mangurian ("Mangurian"), who is deceased. Admission of any testimony or documents which purport to relay

1 evidence from Mangurian to this tribunal is inappropriate because it, (i) directly contradicts the  
2 rights guaranteed by the APA, (ii) violates procedural due process, and (iii) is prohibited by the  
3 confrontation clause of the Sixth Amendment to the United States Constitution.

4 II.

5 **HEARSAY TESTIMONY SHOULD BE EXCLUDED BECAUSE SUCH TESTIMONY**  
6 **PRECLUDES RESPONDENTS' RIGHT OF**  
7 **CROSS-EXAMINATION IN DIRECT VIOLATION OF THE APA**

8 Hearsay is defined as "a statement, other than one made by the declarant while testifying at  
9 the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid.  
10 801(c). Accordingly, statements made by individuals to investigators or others, offered to prove the  
11 truth of the matters asserted by said individuals, clearly constitute hearsay. "Hearsay evidence is  
12 excluded from trial because it cannot be subjected to cross-examination and cannot be probed for  
13 possible errors in perception, memory, sincerity, or clarity." *Larsen v. Decker*, 196 Ariz. 239, 242;  
14 995 P.2d 281, 283 (Ariz. Ct. App. 2000).

15 In this case, to the extent the Staff of the Arizona Securities Commission ("Staff") attempts  
16 to introduce statements made by Mangurian, who is deceased, through a Staff investigator or  
17 otherwise, such testimony is clearly hearsay and admittance of any such testimony would  
18 indisputably violate Respondents' rights to cross-examination. More specifically, Respondents are  
19 precluded from cross-examining any witness the Staff fails to bring to testify in person at the  
20 hearing of this matter. Because the Arizona Administrative Code and APA unquestionably entitle  
21 Respondents to the right to cross-examine any witness, the exclusion of such testimony is  
22 mandatory. *See* APA § 41-1062(A)(1); AAC § R2-19-115(A).

23 Further, to the extent any witness is proffered to testify about statements other persons made  
24 to him/her, either during investigations, inspections, or otherwise, those statements, must be  
25 excluded. Respondents are precluded from cross-examining any individuals who made statements  
26 to the proffered witness in order to test their memory, perception, sincerity or clarity unless the  
27

Staff brings those persons to this hearing to testify in person. *See generally, Larsen*, 196 Ariz. at 242, 995 P.2d at 283.

In *Ortiz v. Eichler*, 794 F.2d 889, 895 (3rd Cir. 1986), the court considered whether hearsay statements introduced without the opportunity of cross-examination were appropriately excluded by the District Court. The Court of Appeals held that the statements were properly excluded:

Claimants sought to enjoin DES's practice of considering at hearings adverse statements from declarants who were not available for cross-examination or confrontation at hearings. This practice, they said, violated claimants' rights under the applicable federal regulations to 'have adequate opportunity . . . [t]o question or refute any testimony or evidence, including [the] opportunity to confront and cross-examine witnesses. [Citations omitted.]

*Ortiz*, 794 F.2d at 895.

Claimants argued that admission of such testimony violated both their Constitutional rights, and the plain language of the statutes guaranteeing cross-examination. The Court of Appeals agreed with the District Court that the plain language of the statutes prohibited introduction of such hearsay testimony:

We find the language devoid of ambiguity; claimants have the right to 'question or refute any testimony or evidence, including [the] opportunity to confront and cross-examine adverse witnesses.'

*Id.*

The APA requires no less. "Every person who is a party to such proceedings shall have the right to be represented by counsel, to submit evidence in open hearing and **shall have the right of cross-examination.**" APA § 41-1062(A)(1) (emphasis added.) Once again, because Respondents are precluded from cross-examining out-of-court statements made by persons not present at the hearing, exclusion of such statements is mandatory. *See* APA § 41-1062(A)(1); AAC § R2-19-115(A).

Likewise, documents containing statements, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" are hearsay and should be. Ariz. R. Evid. 801(c). To the extent the Staff proffers documents not authored by a testifying witness and proffered for the truth of the matters asserted, said documents

are indisputably hearsay. Further, because the author(s) of said document(s) are not presented by the Staff to testify live at the hearing of this matter, Respondents are precluded from cross-examining the author(s) in direct violation of APA § 41-1062(A)(1); AAC § R2-19-115(A). Therefore, such documents must also be excluded.

### III.

#### **HEARSAY EVIDENCE SHOULD BE EXCLUDED BECAUSE SUCH EVIDENCE PRECLUDES RESPONDENTS' RIGHT OF CROSS-EXAMINATION IN VIOLATION OF PROCEDURAL DUE PROCESS RIGHTS**

The *Matthews v. Eldridge*<sup>1</sup> case sets forth the test to be applied when determining whether an administrative action or procedure, or denial thereof, constitutes a deprivation of due process. Due process is not a rigid rule to be applied the same way in every case. In fact, it is flexible and must be tailored to the facts of each case:

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”

*Matthews*, 424 U.S. at 902 (quoting, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Considering the balancing test articulated in *Matthews*, Respondents must be afforded a fair hearing and opportunity to present their case. This includes the ability to cross-examine witnesses who present adverse testimony. That is not possible here because Mangurian is deceased.

The *Matthews* test requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Matthews*, 424 U.S. at 903.

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<sup>1</sup> 424 U.S. 319, 96 S.Ct. 893 (1976).

1 As applied to this case, these factors make clear that if the Division cannot produce a  
2 witness for cross-examination the Respondents' due process rights will be violated. First, the  
3 penalties facing Respondents include the possibility of monetary sanctions and a significant  
4 deprivation of property. Second, there is a substantial risk of an erroneous deprivation if the  
5 Respondents are not allowed to cross-examine the author of potentially damaging statements to  
6 check for bias, truthfulness and the like. Finally, the Division's interest is small. There is little or  
7 no burden on the Division if the Staff is ordered to rely on witnesses who are available for  
8 cross-examination. The cost of relying on witnesses who can be cross-examined pales in  
9 comparison to the possible adverse impact on the Respondents.

10 If the hearsay testimony is admitted without the benefit of cross-examination, the  
11 Respondents may suffer a deprivation of property that is substantial. For this reason alone, the  
12 hearsay statements should be precluded.

13 IV.

14 **HEARSAY EVIDENCE SHOULD BE EXCLUDED BECAUSE SUCH EVIDENCE**  
15 **PRECLUDES RESPONDENTS' RIGHT OF CROSS-EXAMINATION**  
16 **IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT**  
17 **TO THE UNITED STATES CONSTITUTION**

18 Although the protections of the Sixth Amendment and the right to confrontation typically  
19 apply only in criminal cases, the importance of this right has been applied in administrative  
20 proceedings through the protections of procedural due process. In essence, although confrontation  
21 is guaranteed in criminal cases by the Sixth Amendment, the same right is afforded in  
22 Administrative Proceedings through the Fourteenth Amendments requirement that Administrative  
23 proceedings are fundamentally fair.

24 Cross-examination is a fundamental right, required for due process. The reasons for  
25 providing cross-examination are numerous, but are succinctly stated in *Coy v. Iowa*, 487 U.S.  
26 1012, 108 S.Ct. 2798 (1988):  
27

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1 The perception that confrontation is essential to fairness has persisted over the  
2 centuries because there is much truth to it. A witness 'may feel quite differently  
3 when he has to repeat his story looking at the man whom he will harm greatly by  
4 distorting or mistaking the facts.' [Citation omitted.] It is always more difficult  
5 to tell a lie about a person 'to his face' than 'behind his back.'

6 Coy, 487 U.S. at 1019.

7 Without the ability to cross-examine Mangurian, Respondents' due process rights will be  
8 violated. For this reason, any hearsay statements regarding comments from Mangurian must be  
9 excluded.

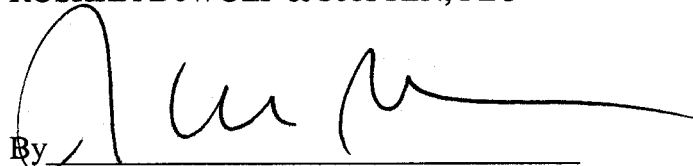
10 V.

11 CONCLUSION

12 For each of the foregoing reasons, Respondents respectfully request that all hearsay  
13 testimony and hearsay documentary evidence be precluded.

14 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of October, 2006.

15 ROSHKA DeWULF & PATTEN, PLC

16 By 

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25 ORIGINAL and thirteen copies of the foregoing  
26 filed this 27<sup>th</sup> day of October, 2006 with:

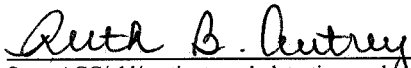
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1 Copy of the foregoing hand-delivered  
2 this 27<sup>th</sup> day of October, 2006 to:

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